A

JALALUDDIN ISMAIL

v.

KETUA PENGARAH PERKHIDMATAN AWAM, MALAYSIA & ANOR

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
C [CIVIL APPEAL NO: W-01-264-2010]
3 MAY 2012

ADMINISTRATIVE LAW: *Rights and liabilities of public servants - Dismissal - Dismissal in public interest - Dismissal of Ketua Penolong*
D *Pengarah, Institut Alam Sekitar Malaysia - Whether provisions of reg. 49 of Public Officers (Conduct and Discipline) Regulations 1993 complied with - Whether termination null and void - Whether first respondent a proper disciplinary authority - Whether appellant given right to be heard - Whether appellant to be given copy of report from head of*
E *department*

CONSTITUTIONAL LAW: *Public servants - Termination of service 'in the public interest' - Dismissal of Ketua Penolong Pengarah, Institut Alam Sekitar Malaysia - Whether provisions of reg. 49 of Public Officers*
F *(Conduct and Discipline) Regulations 1993 complied with - Whether first respondent a proper disciplinary authority - Whether appellant given right to be heard - Whether appellant to be given copy of report from head of department - Federal Constitution, art. 135(2)*

PUBLIC SERVANTS: *Dismissal - Dismissal of public servant -*
G *Dismissal in public interest - Dismissal of Ketua Penolong Pengarah, Institut Alam Sekitar Malaysia - Whether provisions of reg. 49 of Public Officers (Conduct and Discipline) Regulations 1993 complied with - Whether first respondent a proper disciplinary authority - Whether appellant given right to be heard - Whether appellant to be given copy of*
H *report from head of department*

PUBLIC SERVANTS: *Pensions - Termination from public service under s. 10(5)(d) of Pensions Act 1980 on grounds of public interest - Whether pension only payable if public servant required by Agong to retire*
I *in public interest - Whether first respondent a proper authority to convey Agong's decision - Federal Constitution, art. 40(1)*

The appellant was holding the post of Ketua Penolong Pengarah, Institut Alam Sekitar Malaysia, Jabatan Alam Sekitar and was a public servant within the provisions of art. 132(1)(c) of the Federal Constitution. The appellant's service was terminated by a letter dated 25 September 2008 under the hand of the first respondent. The said letter was to the effect that the Government had decided to terminate the appellant's service in the public interest under reg. 49(3) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'). It was also indicated in the said letter that acting under s. 10(5)(d) of the Pensions Act 1980 ('the Act'), the Yang di-Pertuan Agong ('Agong') had decided that the appellant retire in the public interest. The appellant, contending that the termination of his service was null and void and of no effect, applied for judicial review of the decision. The High Court dismissed his application and hence this appeal. The appellant raised, *inter alia*, the following issues: (i) whether the respondents had complied with reg. 49 failing which will render the termination null and void and of no effect (the first issue); (ii) whether the first respondent was the authority to convey the decision of the Agong (the second issue); and (iii) whether the first respondent was the proper disciplinary authority within the definition of 'Disciplinary Authority' in reg. 3 of the 1993 Regulations (the third issue). The appellant argued that before his service could be lawfully terminated under reg. 49(3), there must be strict compliance with the provisions of reg. 49(1) and (2). It was contended that the letter dated 25 September 2008 did not indicate that the provisions of reg. 49(1) and (2) had been complied with. The appellant also claimed that he was not supplied a copy of the report from the appellant's head of department upon which the second respondent was satisfied that the appellant's service should be terminated in the public interest. Issue was also raised as to on whose advice did the Agong act on in exercising the power under s. 10(5)(d) of the Act in terminating the appellant's service.

Held (dismissing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The authority who has the power to terminate the service of an officer under reg. 49 is the Government of Malaysia, *ie*, the second respondent herein. The letter dated 25 September 2008 clearly indicated that it was the government who decided to terminate the appellant's service pursuant to reg. 49(3).

Although the letter was signed by the first respondent, it did not invalidate the decision to terminate the appellant's service. The decision was not his decision. The decision was properly made and the power to terminate was properly exercised by the government as provided for under reg. 49(3) and by the Agong under s. 10(5)(d) of the Act. (paras 17, 19 & 20)

(2) The Government may terminate the service of the officer if the government is satisfied it is desirable in the public interest so to do, after having regard to the conditions of the service, the usefulness of the officer to the service, the work and the conduct of the officer and all other circumstances of the case. The satisfaction relates to the satisfaction of the Government. It is for the Government to decide on the desirability of the termination. The Government is not legally obliged to give reason to any party as to what considerations have fulfilled its satisfaction or what is the degree of its satisfaction. The requirements for 'satisfaction' and termination of the service as required under reg. 49 had been complied with. There was no procedural irregularity committed by the respondents in the proceedings. (para 23)

(3) The termination proceedings under reg. 49 provides no right to the officer involved to be given opportunity of being heard. Hence, the protections and remedies available under art. 135 of the Federal Constitution is not applicable and not available to an officer whose service is being terminated in the public interest under reg. 49. Therefore, the appellant's complaint that he was not supplied with a copy of the report, if any, or had not been appraised of the contents of the report upon which the government was satisfied that the appellant's service should be terminated in the public interest, could not hold water and was not supported by law. (para 25)

(4) An officer whose service has been terminated in the public interest under reg. 49 can only be accorded payment of pension after he has been required to retire in the public interest by the Agong under s. 10(5)(d) of the Act. Only then pension can be granted to him by the Agong under s. 13 of the Act. The Agong is required under art. 40(1) of the Federal Constitution in the exercise of his functions to act in accordance with collective or individual ministerial advice. The

reference therefore to the second respondent in the letter dated 25 September 2008 was sufficiently comprehensive to manifest the Agong's participation in the decision made. (paras 27 & 30)

(5) The first respondent's role was purely administrative in nature and it did not in any way render the termination of the appellant's service invalid. The appellant's contention that the Prime Minister should be the authority to convey the decision of the Agong lacked merit. The first respondent had strictly complied with the procedural requirements under reg. 49. (paras 31 & 32)

(6) In exercising such power for judicial review, the court must be mindful that the court should be slow and cautious in going into the 'substance' of the decision under review, especially in cases involving administrative decision by bodies or persons who are charged with performance of public acts or duties as in the present appeal. There was no element of procedural impropriety, illegality or irrationality throughout the proceedings until the appellant's service was terminated by the Government. (paras 37 & 38)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memegang jawatan Ketua Penolong Pengarah, Institut Alam Sekitar Malaysia, Jabatan Alam Sekitar dan adalah pegawai kerajaan dalam rangkuman peruntukan perkara 132(1)(c) Perlembagaan Persekutuan. Perkhidmatan perayu ditamatkan melalui surat bertarikh 25 September 2008 yang ditandatangani oleh responden pertama. Surat tersebut menyatakan bahawa Kerajaan telah memutuskan untuk menamatkan perkhidmatan perayu atas kepentingan awam di bawah Peraturan 49(3) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan 1993'). Ia juga dinyatakan di dalam surat tersebut bahawa bertindak di bawah s. 10(5)(d) Akta Pencen 1980 ('Akta tersebut'), Yang di-Pertuan Agong ('Agong') telah memutuskan bahawa perayu bersara atas kepentingan awam. Perayu, menghujah bahawa penamatan perkhidmatannya adalah batal dan tidak sah dan tidak mempunyai kesan, memohon untuk semakan kehakiman keputusan tersebut. Mahkamah Tinggi menolak permohonannya dan dengan itu rayuan ini. Perayu membangkitkan, antara lain, isu-isu: (i) sama ada responden-responden telah

mematuhi Peraturan 49 yang jika gagal akan menjadikan penamatan tersebut batal dan tidak sah dan tidak mempunyai kesan (isu pertama); (ii) sama ada responden pertama adalah pihak yang berkuasa untuk menyampaikan keputusan Agong (isu kedua); dan (iii) sama ada responden pertama adalah pihak berkuasa tatatertib yang sewajarnya dalam rangkuman takrifan 'Pihak Berkuasa Disiplin' dalam Peraturan 3 Peraturan-Peraturan 1993 (isu ketiga). Perayu berhujah bahawa sebelum perkhidmatannya boleh ditamatkan secara sah di bawah Peraturan 49(3), perlu ada pematuhan ketat peruntukan-peruntukan Peraturan 49(1) dan (2). Dihujahkan bahawa surat bertarikh 25 September 2008 tidak menyatakan bahawa peruntukan-peruntukan Peraturan 49(1) dan (2) telah dipatuhi. Perayu juga menyatakan bahawa beliau tidak diberikan salinan laporan daripada ketua jabatan perayu yang disandarkan oleh responden kedua di mana ia berpuashati bahawa perkhidmatan perayu wajar ditamatkan atas kepentingan awam. Isu juga dibangkitkan berkenaan atas nasihat siapakah Agong bertindak dalam melaksanakan kuasa di bawah s. 10(5)(d) Akta tersebut dalam membatalkan perkhidmatan perayu.

Diputuskan (menolak rayuan dengan kos):
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Pihak yang mempunyai kuasa untuk membatalkan perkhidmatan seseorang pegawai di bawah Peraturan 49 adalah Kerajaan Malaysia iaitu responden kedua di sini. Surat bertarikh 25 September 2008 jelas menyatakan bahawa ia adalah Kerajaan yang memutuskan untuk menamatkan perkhidmatan perayu berikutan Peraturan 49(3). Walaupun surat tersebut ditandatangani oleh responden pertama, ia tidak membatalkan kesahan keputusan untuk menamatkan perkhidmatan perayu. Keputusan tersebut bukan keputusannya. Keputusan tersebut dibuat secara wajar dan kuasa untuk menamatkan dilaksanakan dengan betul oleh Kerajaan seperti yang diperuntukkan di bawah Peraturan 49(3), dan oleh Agong di bawah s. 10(5)(d) Akta tersebut.

(2) Kerajaan boleh menamatkan perkhidmatan pegawai tersebut jika kerajaan berpuashati bahawa ia perlu demi kepentingan awam untuk berbuat demikian, selepas mempertimbangkan keadaan perkhidmatan, kegunaan pegawai bagi perkhidmatan

tersebut, kerja tersebut dan tingkah laku pegawai tersebut dan kesemua hal keadaan kes. Kepuasan tersebut berkait dengan kepuasan Kerajaan. Ia adalah untuk Kerajaan memutuskan keperluan bagi penamatan tersebut. Kerajaan tidak bertanggungjawab dari segi undang-undang untuk memberikan alasan kepada mana-mana pihak mengenai apakah pertimbangan yang telah memenuhi keperluannya atau apakah takat kepuasannya. Keperluan untuk 'kepuasan' dan penamatan perkhidmatan seperti yang diperlukan di bawah Peraturan 49 telah dipatuhi. Tidak ada ketidakaturan prosedur yang dilakukan oleh responden dalam prosiding tersebut.

(3) Prosiding penamatan di bawah Peraturan 49 tidak memperuntukkan apa-apa hak kepada pegawai yang terlibat untuk diberikan peluang didengar. Maka, perlindungan dan remedi yang wujud di bawah perkara 135 Perlembagaan Persekutuan tidak terpakai dan tidak disediakan untuk seseorang pegawai yang perkhidmatannya ditamatkan bagi kepentingan awam di bawah Peraturan 49. Maka, aduan perayu bahawa beliau tidak dibekalkan dengan salinan laporan, jika ada, atau telah dinilai berdasarkan kandungan laporan yang disandarkan oleh Kerajaan di mana ia berpuashati bahawa perkhidmatan perayu wajar ditamatkan demi kepentingan awam, tidak mempunyai apa-apa kesan dan tidak disokong oleh undang-undang.

(4) Seseorang pegawai yang perkhidmatannya telah dibatalkan untuk kepentingan awam di bawah Peraturan 49 hanya boleh diberikan bayaran pencen selepas beliau dikehendaki bersara demi kepentingan awam oleh Agong di bawah s. 10(5)(d) Akta tersebut. Hanya selepas itu pencen boleh diberikan kepadanya oleh Agong di bawah s. 13 Akta tersebut. Agong diperlukan di bawah perkara 40(1) Perlembagaan Persekutuan dalam pelaksanaan fungsinya untuk bertindak menurut nasihat menteri secara kolektif atau individu. Oleh itu, rujukan tersebut kepada responden kedua di dalam surat bertarikh 25 September 2008 adalah cukup lengkap untuk menjelaskan penglibatan Agong dalam keputusan yang dibuat.

(5) Peranan responden pertama adalah bersifat pentadbiran semata-mata dan tidak dalam apa-apa cara sekalipun menyebabkan penamatan perkhidmatan perayu sebagai tidak

sah. Hujahan perayu bahawa Perdana Menteri sepatutnya menjadi pihak yang menyampaikan keputusan Agong adalah tidak bermerit. Responden pertama telah secara ketat mematuhi keperluan-keperluan prosedur di bawah Peraturan 49.

(6) Dalam melaksanakan kuasa untuk semakan kehakiman, mahkamah mestilah sedar bahawa mahkamah perlu berhati-hati dalam mencampuri 'kebenaran' keputusan di bawah semakan, khususnya dalam kes-kes yang melibatkan keputusan pentadbiran oleh badan-badan atau orang-orang berkuasa terhadap prestasi dalam tindakan atau tanggungjawab seperti di dalam rayuan ini. Tidak ada unsur ketidakadilan, ketaksahan atau ketidakrasionalan sepanjang prosiding sehingga perkhidmatan perayu ditamatkan oleh Kerajaan.

Case(s) referred to:

Balakrishnan v. Ketua Pengarah Perkhidmatan Awam And The Government Of Malaysia [1981] 1 LNS 64 FC ***(refd)***

Chief Constable of North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***

Haji Ariffin v. Government of Pahang [1968] 1 LNS 45 FC ***(refd)***

Pengarah Pelajaran Wilayah Persekutuan & Ors v. Loot Ting Yee [1981] 1 LNS 186 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

T Ganeswaran v. Suruhanjaya Polis Di Raja Malaysia & Satu Lagi [2005] 3 CLJ 302 CA ***(refd)***

Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 40(1)(a), 49(3), (4), 132(a)(c), (1)(c), 132(2), (2A), 135(2)

Pensions Act 1980, ss. 3, 10(5)(d), 13

Public Officers (Conduct and Discipline) Regulations 1993, regs. 3, 49(1), (2), (3), (5)

Rules of the High Court 1980, O. 53

For the appellant - Karpal Singh (Zaleha Al-Hayat with him); M/s Karpal Singh & Co

For the respondents - Shamsul Bolhassan; SFC

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R1-25-320-2008]

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal against the decision of the learned High Court Judge dated 9 April 2010 dismissing with costs the appellant's application for judicial review dated 4 November 2008 seeking *inter alia* for an order of *certiorari* to quash the decision of the termination of service of the appellant in public interest and a declaration that the purported termination of service of the appellant was wrong in law, null and void.

[2] In full, the appellant, at the stage of the High Court, sought the following reliefs, namely:

(a) an order for *certiorari* to quash the termination of service of the appellant in the public interest pursuant to reg. 49(3) of the Public Officers (Conduct and Discipline) Regulations 1993; and also to quash the order under s. 10(5)(d) of the Pensions Act 1980 communicated to the appellant by letter dated 25 September 2008 from the 1st respondent;

(b) a declaration that the purported termination of service of the appellant communicated to the appellant by letter dated 25 September 2008 under the hand of the 1st respondent is null and void and of no effect or consequence;

(c) an order for damages and loss incurred by the appellant consequent upon the acts of the respondents;

(d) an order directing reinstatement of the appellant to the position he held at the time of the purported termination of service and any promotion he was entitled to thereafter;

(e) an order that the Deputy Registrar of High Court, Kuala Lumpur takes an account of all salaries, emoluments and other benefits the appellant is entitled to as a consequence of his termination of service;

(f) interest on the adjudged sum on such rates and for such periods deemed fit and proper by the Honourable Court; and

(g) costs.

Factual Background

[3] The appellant joined the public service on 3 May 1983. At the material time (when his service was terminated), he was holding the post of Ketua Penolong Pengarah, Institut Alam Sekitar Malaysia (EiMAS), Jabatan Alam Sekitar and was a public servant within the provisions of art. 132(1)(c) of the Federal Constitution.

[4] The appellant's service was terminated with effect from 24 October 2008 by a letter dated 25 September 2008 under the hand of the 1st respondent (Ketua Pengarah Perkhidmatan Awam Malaysia). The said letter, *inter alia* was to the effect that the government had decided to terminate the appellant's service in the public interest under reg. 49(3) of the Public Officers (Conduct and Discipline) Regulations 1993 (the 1993 Regulations). It was also indicated in para. 2 in the said letter that acting under s. 10(5)(d) of the Pensions Act 1980, the Yang di-Pertuan Agong has decided that the appellant retires in the public interest. For case of reference, the full text of the said letter is reproduced below:

> Encik Jalaluddin bin Ismail
>
> (No. K/P: 590729-10-6233)
>
> Melalui dan salinan:
>
> Ketua Pengarah Alam Sekitar
> Jabatan Alam Sekitar Malaysia
> Kementerian Sumber Asli & Alam Sekitar
> Aras 3, Podium 3, Wisma Sumber Asli
> No. 25, Persiaran Perdana, Presint 4
> 62574 W.P. PUTRAJAYA
>
> Tuan,
>
> Adalah saya memaklumkan bahawa Kerajaan telah memutuskan untuk menamatkan perkhidmatan tuan demi kepentingan awam di bawah Peraturan 49(3), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 berkuat kuasa 24 Oktober 2008.
>
> 2. Pada menjalankan kuasa di bawah s. 10(5)(d), Akta Pencen 1980, Seri Paduka Baginda Yang di-Pertuan Agong telah memutuskan bahawa tuan dikehendaki bersara demi kepentingan awam. Tarikh kuat kuasa persaraan itu ialah pada 24 Oktober 2008.

3. Tuan boleh mengambil dan menghabiskan kesemua cuti rehat yang tuan layak sebanyak 16 hari bermula pada 30 September 2008. Urusan pencen tuan akan diuruskan mengikut Akta Pencen 1980.

Sekian, Terima kasih.

"Berkhidmat Untuk Negara"

t.t.

(Tan Sri Ismail Adam)
Ketua Pengarah Perkhidmatan Awam Malaysia.

[5] The appellant contended that the termination of his service is null and void and of no effect. The appellant then applied for judicial review under O. 53 of the Rules of the High Court 1980. On 9 April 2010 the High Court dismissed his application with costs of RM10,000 to the 2nd respondent. Dissatisfied with the decision, the appellant appealed to the Court of Appeal. Hence the present appeal.

At The Court Of Appeal

[6] The appellant raised sixteen grounds in his memorandum of appeal before us. For ease of reference all the grounds can be summarised into three main issues, namely:

(a) whether the respondents had complied with reg. 49 of the 1993 Regulations failing which will render the termination null and void and of no effect (grounds 1, 2, 3, 4, 5, 9, 11, 12, 14, 15 and 16) (1st issue);

(b) whether the 1st respondent is the authority to convey the decision of the Yang di-Pertuan Agong (grounds 6, 7 and 13) (2nd issue); and

(c) whether the 1st respondent is the proper disciplinary authority within the definition of 'Disciplinary Authority' in reg. 3 of the 1993 Regulations (grounds 8 and 10) (3rd issue).

The Appellant's Contentions

[7] Learned counsel for the appellant argued that before the appellant's service could be lawfully terminated under reg. 49(3) of the 1993 Regulations, there must be strict compliance with the provisions of reg. 49(1) and (2), the fulfillment of which was a condition precedent to any action under reg. 49(3); and the decision making process in relation to the termination of service in the provisions of reg. 49 had to be complied with failing which the court had the jurisdiction to declare the termination unlawful and invalid.

[8] In relation to the above issue, the appellant further contended that:

(a) the letter dated 25 September 2008 (informing him of the termination) is null and void, and no effect as there is no indication in the said letter at all that the provisions of regs. 49(1) and (2) have been complied with; there is no indication whatsoever of the grounds of the 2nd respondent's satisfaction in relation to the appellant's work and conduct or in anyway whatever that it was desirable in the public interest to terminate the appellant's service; in any event the said letter only adverts to reg. 49(3);

(b) the appellant has not been supplied a copy of the report, if any, or had been appraised in any way otherwise of the contents of the report from the appellant's head of department upon which the 2nd respondent was satisfied that the appellant's service should be terminated in the public interest in contravention of the rules of natural justice;

(c) there was no basis for the 2nd respondent to terminate his service because in the course of his employment he had not at any time been disciplined in relation to his conduct or his work being unsatisfactory or in being anyway blameworthy in the course of his employment; he has been bestowed several decorations in 1997, 1999 and 2001; the termination of his service in the public interest has not been properly effected and consequently the action of the Yang di-Pertuan Agong requiring him to retire from the public service under s. 10(5)(d) of the Pensions Act 1980 is unsupportable in law

as the Yang di-Pertuan Agong could not have had any material before him to act under the provisions of the said section;

(d) the communication by the 1st respondent of the act of the Yang di-Pertuan Agong requiring the appellant to retire in the public interest is not supportable in law as the 1st respondent is not the authority, in law, to convey the decision of the Yang di-Pertuan Agong;

(e) the appellant has been subjected to abuse of power and *mala fides* as he was isolated and accorded no work from January 2005 right up to the date of his termination, these evidence of abuse of power and *mala fides* would render his termination of service in the public interest null and void and of no effect;

(f) there has been contravention of the provisions of art. 144 (5A) proviso (b) of the Federal Constitution in that the 1st respondent was not the lawful disciplinary authority within the meaning of "Disciplinary Authority' in reg. 3 of the 1993 Regulations.

[9] The appellant also queried "on whose advice did the Yang di-Pertuan Agong act on" in exercising the power under s. 10(5)(d) of the Pensions Act 1980 in terminating his service in the public interest. The appellant submitted that if it was the Yang di-Pertuan Agong who made the decision to terminate, then the termination of the appellant ought to have been communicated by the Prime Minister and not by the 1st respondent.

The Respondent's Contentions

[10] Learned Senior Federal Counsel for the respondents, referred to art. 132(2A) of the Federal Constitution which provides that a public officer holds office during the pleasure of the Yang di-Pertuan Agong. To strengthen his submission on this point, learned Senior Federal Counsel referred to the decision of the Federal Court in the case of *Pengarah Pelajaran Wilayah Persekutuan & Ors v. Loot Ting Yee* [1981] 1 LNS 186, wherein Salleh Abas FJ (as he then was) said *inter alia*:

A The law relating to civil service in Malaysia is based upon a twin principle that every employee holds office during the pleasure of the Yang di-Pertuan Agong and that the qualifications for appointment and conditions of service are regulated by him, in addition and subject to any law on the same subject matters having been made by the parliament.

B

[11] The respondents also submitted that it is the Yang di-Pertuan Agong who is the authority to decide whether the appellant's service is still required or should be terminated in public interest under reg. 49(1) and (3) of the 1993 Regulations, based C on the report and recommendation made by the head of department; the 1st respondent's duty is to forward a memorandum to present the relevant report for the Yang di-Pertuan Agong's consideration; therefore the 1st respondent has acted in accordance with reg. 49(1) and (3) of the 1993 D Regulations.

Decision Of This Court

[12] The present appeal revolves mainly on the interpretation of reg. 49 of the Public Officers (Conduct and Discipline) Regulations E 1993, (the 1993 Regulations) which reads as follows:

Termination in the public interest

49(1) Notwithstanding any provision in these regulations, where F the Government finds or where representations are made to the Government that it is desirable that the service of an officer be terminated in the public interest, the Government may call for a full report from the Head of Department in which the officer is or has been serving.

G (2) The report referred to in sub regulation (1) shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department.

(3) if, after considering the report received under the sub regulation (1), the Government is satisfied that, having H regard to the conditions of the service, the usefulness of the officer to the service, the work, the conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate the service of the officer with effect from such date as the Government shall specify.

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(4) It shall be lawful for the appropriate Disciplinary Authority to recommend to the Government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings have not been carried out under any of the provisions of these regulations; and the Government may so terminate the service of such officer.

(5) Notwithstanding anything in these Regulations and any other law to the contrary, in terminating the service of any officer in the public interest under the regulation, such officer may not be given any opportunity of being heard and an officer whose service has been terminated in the public interest under this regulation shall not for the purpose of Article 135(2) of the Federal Constitution, be regarded as having been dismissed, regardless of whether such termination of the service of the officer involved an element of punishment or was in connection with conduct in relation to his office which the Government regards as unsatisfactory or blameworthy.

[13] The 1993 Regulations were made by the Yang di-Pertuan Agong pursuant to art. 132(2) of the Federal Constitution, which reads:

(1) …

(2) Except as otherwise expressly provided by this Constitution, the qualifications for appointment and conditions of service of persons in the public services other than those mentioned in paragraph (g) of clause (1) may be regulated by federal law and, subject to the provisions of any such law, by the Yang di-Pertuan Agong; and the qualifications for appointment and conditions of service of persons in the public service of any state may be regulated by State law and, subject to the provisions of any such law, by the ruler or Yang di Pertua Negeri of that State.

[14] In short, art. 132(2) provides that the qualifications for appointment and conditions of service of persons in the public services may be regulated by federal law and subject to the provisions of any such law, by the Yang di-Pertuan Agong. Regulation 49 of the 1993 Regulations is one of the regulations governing the conditions of service of persons in the related public services particularly on termination in the public interest.

[15] Article 132(2A) of the Federal Constitution provides that a public officer holds office during the pleasure of the Yang di-Pertuan Agong. The said art. 132(2) reads:

> (2A) Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c), (d), (f) and (h) of clause (1) holds office during the pleasure of the Yang di-Pertuan Agong and except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Yang di Pertua Negeri.

[16] The Federal Court's decision in the case of *Haji Ariffin v. Government of Pahang* [1968] 1 LNS 45, is a clear authority on the principle that every member of the public service holds office during the pleasure of the Yang di-Pertuan Agong or Ruler of State (as the case may be). In that case, Raja Azlan Shah J, (as His Majesty then was) expressed:

> Art 132(2A) has, subject to exceptions expressly provided by Federal and State Constitutions, adopted the English common law that every person who is a member of the public service of the Federal or of a State Government holds office during the pleasure of the Yang di-Pertuan Agong or the Ruler or Governor as the case may be. The express exceptions are clearly embodied in art. 135 which put a check on the unabridged exercise of pleasure. The pleasure of the Yang di-Pertuan Agong, or the Ruler of Governor, would still be there, but it has to be exercised in accordance with the statutory obligations of art. 135, and it is the breach of these obligations that afford a cause of action. If the termination of service does not violate the provisions of art. 135, this court is not competent to quash an order terminating the service under item 1 of the First Schedule to the Courts Judicature Act 1964.

[17] Regulation 49 of the 1993 Regulations talks about termination of service in the public interest. The authority who has the power to terminate the service of an officer under the said regulation is the Government of Malaysia, the 2nd respondent in the present appeal. In the Federal Court case of *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam And The Government Of Malaysia* [1981] 1 LNS 64, the Government of Malaysia had decided to terminate the appellant's service in the public interest under s. 10(d) of the Pensions Ordinance and General Order 44; and the termination was conveyed to the appellant by the Director

of Public Services. The appellant brought an action for a declaration that the termination of his service in the public interest was void, inoperative and of no effect. One of the grounds of appeal in that case was that the requirement for the appellant to retire from the public service on the termination of his employment in the public interest could only be exercised by the Yang di-Pertuan Agong as required and not by the Government of Malaysia as intimated by the Director of Public Services and accordingly vitiated the exercise of the power under the statutory provisions.

[18] In his judgment, Abdoolcader J (as he then was) said as follows:

> [19] ... The Yang di-Pertuan Agong is a constitutional monarch and is required under Article 40(1) of the Constitution in the exercise of his functions (except on certain matters that do not concern this appeal) to act in accordance with collective or individual ministerial advice and not on his own initiative (*Teh Cheng Poh alias Char Meh v. PP, Malaysi*a [1979] 1 MLJ 50; [1980] AC 458 (at pp. 466-473). In view of this, the reference to the 2nd respondent in the letter in question is not more than a loose use of the term to encapsulate the decision of the Yang di-Pertuan Agong for the purposes of section 10 of the Pensions Ordinance and this view is reinforced by the proper presumption that can be made in this respect by the reference in the letter of 13 October 1971 of the termination having been effected under section 10(d) of the Pensions Ordinance which specifically refers to the power of the Yang di-Pertuan Agong to require an officer to retire from the public service on the termination of his employment in the public interest. Section 10 of the Pensions Ordinance must be read in the light of section 8 thereof, subsection (1) of which provides that no pension shall be granted under the Ordinance to any officer until he shall have retired from the public service and subsection (2) whereof is in like terms as section 10 of the Ordinance in prescribing that no pension shall be granted to any officer who has retired from the public service otherwise than as specified therein. Further support for the presumption of the Yang di-Pertuan Agong's exercise of his power on ministerial advice again appears in the letter of 13 October 1971, which goes on the state that the question of the appellant's eligibility for a pension would be dealt with under the Pensions Ordinance and also in the subsequent letter of 5 May 1972, indicating that when approval as to the appellant's pension factor was received action would be taken for the pension to be paid to him.

A [21] When we speak of the Government, we refer to His Majesty's Government which includes His Majesty the Yang di-Pertuan Agong and of which he is the constitutional head. The reference therefore to the 2nd respondent in the letter of 13 October 1971, is sufficiently comprehensive to manifest the Yang di-Pertuan Agong's participation in the decision made and would appear to be no more than a composite term to intimate the exercise by the Yang di-Pertuan Agong of his powers under s. 10 of the Pensions Ordinance on ministerial advice, and the communication by the 1st respondent of the decision so made by the 2nd respondent is only indicative, to use the words of Brightman J, in *In re Golden Chemical Products Ltd* [1976] Ch 300 (at p. 307), 307 applying the law as explained by Lord Greene M.R., in *Carltona, Ltd v. Commissioners of Works & Ors* [1943] 2 All ER 560 (at p. 563), 563 of 'a devolution of power – delegation is the wrong word'. In *Lim Lian Geok v. The Minister of the Interior, Federation of Malaya* [1964] MLJ 158 it was accepted before the Privy Council that a notice of intended deprivation of citizenship was not in any way invalid because it was signed by the Registrar-General of Citizens and the contention that there had been a delegation by the Minister was abandoned; these were points of argument taken unsuccessfully in the courts below.

[22] We cannot but reject in the circumstances the argument advanced that the Yang di-Pertuan Agong did not in fact require the appellant to retire from the public service on the termination of his employment in the public interest under section 10(d) of the Pensions Ordinance.

[23] In any event, even assuming for a moment for the sake of argument that the termination of the appellant's service involves any punitive element or can be impugned on the basis of the contentions advanced, but we find it does not and cannot, the position is covered by the further proviso inserted in Article 135(2) of the Constitution on 31 December 1978, and made effective retrospectively as from 31 August 1957, to the effect that the termination of the service of a public officer in the public interest does not constitute dismissal on the grounds relied on by the Appellant. This proviso would accordingly, if the appellant had any just cause for complaint, deprive him of any relief or remedy.

[19] In the present case, the relevant termination letter dated 25 September 2008, at para. (1) clearly indicates that it was the government who had decided to terminate the appellant's service in the public interest pursuant to reg. 49(3) of the 1993

Regulations: "Adalah dimaklumkan bahawa kerajaan telah memutuskan untuk menamatkan perkhidmatan tuan demi kepentingan awam di bawah Peraturan 49(3), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 berkuat kuasa 24 Oktober 2008". A

[20] Even though the said letter was signed by one Tan Sri Ismail Adam (the 1st respondent in the present appeal), it did not invalidate the decision to terminate the service of the appellant. The decision was not his decision. The decision was properly made and the power to terminate was properly exercised by the government as provided for under reg. 49(3); and by the Yang di-Pertuan Agong under s. 10(5)(d) of the Pensions Act 1980. B C

[21] The termination proceedings under reg. 49 can be initiated by the government itself or through representations made to the government: "where the government finds or where representations are made to the government". The findings or the representations made to the government must relate that "it is desirable that the service of an officer be terminated in the public interest." That is the starting point for a proceeding to be initiated under reg. 49. D E

[22] Once the government has entertained such a finding or representation, the next procedural step to be done is for the government to call for a full written report from the head of department in which the officer is or has been serving. The said report shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the head of department. F

[23] The government may terminate the service of the officer if the government is satisfied it is desirable in the public interest so to do, after having regard to the conditions of the service, the usefulness of the officer to the service, the work and the conduct of the officer and all other circumstances of the case. The termination may take effect from such date as the government shall specify. The satisfaction relates to the satisfaction of the government. It is for the government to decide on the desirability of the termination. The government is not legally obliged to give reason to any party as to what considerations have fulfilled its satisfaction or what is the degree of its satisfaction. In the present case, the letter dated 25 September 2008 clearly indicates that it was the government (the 2nd respondent) who had decided to G H I

terminate the service of the appellant, not the 1st respondent, or any other disciplinary authority. Thus, the requirements for 'satisfaction' and termination of the service as required under reg. 49 of the 1993 Regulations had been complied with. There is no procedural irregularity committed by the respondents in the proceedings.

[24] The Disciplinary Authority has no effective part to play in the proceedings. It has no active role except, as provided under reg. 49(4) of the 1993 Regulations which reads: "it shall be lawful for the appropriate Disciplinary Authority to recommend to the government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings have not been carried out under any of the provisions of the regulations". The recommendation of the Disciplinary Authority is not mandatory in all cases. The government may decide on its own even without any recommendation from the Disciplinary Authority. The government is not legally bound to follow whatever recommendation made by the Disciplinary Authority. This is just to stress that the role of the appropriate Disciplinary Authority in the subject matter is very minimal.

[25] The termination proceeding under reg. 49 is different from any other forms of disciplinary proceedings under the Regulations 1993. Unlike any other forms of disciplinary proceedings, the termination proceedings under reg. 49 provides no right to the officer involved to be given opportunity of being heard and the said officer in question whose service has been terminated in the public interest under reg. 49 shall not for the purpose of art. 135(2) of the Federal Constitution be regarded as having been dismissed, regardless of whether such termination of the service of the officer involved an element of punishment or was in connection with conduct in relation to his office which the government regards as unsatisfactory or blameworthy. This is clearly provided for in reg. 49(5) of the Regulations. That being the case, all the protections and remedies available under art. 135 of the Federal Constitution is not applicable and not available to an officer whose service is being terminated in the public interest under reg. 49, as in the present case. Therefore, the appellant's complaint that he has not been supplied with a copy of the report, if any or had not been appraised in any way otherwise of the contents of the report from the appellant's head of department

upon which the government was satisfied that the appellant's service should be terminated in the public interest, cannot hold water and not supported by law.

[26] Section 10(5)(d) of the Pensions Act 1980 talks about "retirement" of any public officer from the public service on the ground that the officer's employment has been terminated in the public interest which must have been done by the government under reg. 49 of the 1993 Regulations. Section 10(5)(d) of the Act reads as follows:

> (5) The Yang di-Pertuan Agong, in the case of a federal officer or a local federal officer, or the State Authority, in the case of a state officer, may require any officer to retire from the public service:
>
> (d) on the ground that the officer's employment has been terminated in the public interest.

The power under s. 10(5)(d) is to be exercised by the Yang di-Pertuan Agong, in the case of a federal officer. 'Retirement' under s. 10(5)(d) is to facilitate granting of pension payment to the officer in question. It empowers the Yang di-Pertuan Agong to request any public officer to retire from the public office on the ground that the officer's employment has been terminated in the public interest. Before the powers under s. 10(5)(d) can be invoked the service of the officer in question must has been first terminated by the government. In the unreported Court of Appeal case of *Rasasingam a/l Rasiah v. Kerajaan Malaysia* (Rayuan Sivil No. P-01-75-2001) the Court of Appeal said *inter alia* that "in any event, the word "may" in the main part of s. 10(5), in the context of its use in that section, imports an element of empowerment or enabling rather than a discretion".

[27] An officer whose service has been terminated in the public interest under reg. 49 of the 1993 Regulations can only be accorded payment of pension after he has been required to retire in the public interest by the Yang di-Pertuan Agong under s. 10(5)(d) of the Pensions Act 1980. Only then pension can be granted to him by the Yang di-Pertuan Agong under s. 13 of the same Act which provides:

Retirement in the public interest

13. The Yang di-Pertuan Agong may, if he thinks fit, grant a pension, gratuity or other benefit to an officer who is retired under paragraph 10(5)(d) or para. 10(5)(f), but the amount shall not exceed that for which such officer would be eligible had his pension, gratuity or other benefit been calculated based on his actual length of reckonable service.

[28] Again, the granting of such a pension is not an absolute right to the officer. It is granted at the discretion of the Yang di-Pertuan Agong "if he thinks fit". The officer in question will not be eligible to be granted pension if he is not required to retire under s. 10(5)(d) of the Pensions Act 1980.

[29] The appellant also raised the issue that if it was the Yang di-Pertuan Agong as the authority exercising the power under reg. 49 of the 1993 Regulations as well as s. 10(5)(d) of the Pension Act 1980, then the Yang di-Pertuan Agong under the circumstances would not be acting in his personal capacity but on executive advice pursuant to art. 40(1A) of the Federal Constitution. The appellant queried on whose advice did the Yang di-Pertuan Agong act on since there is nothing in the affidavit of the 1st respondent to reflect this. The appellant also submitted that if it was the Yang di-Pertuan Agong who made the decision to terminate the service and to retire the appellant then the said decision ought to have been communicated by the Prime Minister and not by the 1st respondent.

[30] The Yang di-Pertuan Agong is a constitutional monarch and is required under art. 40(1) of the Federal Constitution in the exercise of his functions to act in accordance with collective or individual ministerial advice. (see: *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia (supra)*; and *Teh Cheng Poh v. PP* [1978] 1 LNS 202. The reference therefore to the 2nd respondent (the government) in the letter of termination dated 25 September 2008 is sufficiently comprehensive to manifest the Yang di-Pertuan Agong's participation in the decision made. The contents of the said letter sufficiently indicate that the Yang di-Pertuan Agong had exercised his power on ministerial advice; and the communication by the 1st respondent of the decision so made by the Yang di-Pertuan Agong is only indicative of 'a devolution of power' – the term aptly used by Abdoolcader J in *Balakrishnan*'s case. Further support for

the presumption of the Yang di-Pertuan Agong's exercise of his power on ministerial advice also appears in the termination letter dated 25 September 2008 which states that the appellant's eligibility for a pension would be dealt with under the Pensions Act 1980: "Urusan pencen tuan akan diuruskan mengikut Akta Pencen 1980". (The same line of presumption was also adopted by the Federal Court in *Balakrishnan*'s case).

[31] Based on the above mentioned authorities, we are satisfied that there are strong presumptions that the Yang di-Pertuan Agong had exercised his powers under reg. 49 of the 1993 Regulations as well as s. 10(5)(d) of the Pensions Act 1980, on ministerial advice. The 1st respondent, by virtue of his post as the Director General of Public Services whose duty is to call for and to receive any representation and to obtain full report from the appellant's head of department, and later to present them to the Yang di-Pertuan Agong for His Majesty's consideration and assent, is therefore also the same person who would notify the appellant of the decision of the Yang di-Pertuan Agong on the matter. We are of the view that the role of the 1st respondent is purely administrative in nature and it does not in any way render the termination of the appellant's service invalid. The appellant's contention that the Prime Minister should be the authority to convey the decision of the Yang di-Pertuan Agong therefore lacks merit.

[32] In the present case, the 1st respondent had strictly complied with the procedural requirements under reg. 49 of the 1993 Regulations. He had called for full report from the appellant's head of department; received the full report submitted by the head of department; prepared his report on the matter; and the reports were presented to the Yang di-Pertuan Agong for His Majesty's consideration and assent for termination of the appellant's service in the public interest. The 1st respondent's duty is only to present the full report to the Yang di-Pertuan Agong. He is not the authority who decides on the contents of the report. Instead, the report and the recommendation were prepared by the appellant's head of department. It is the Yang di-Pertuan Agong who is the authority to decide whether the appellant's service is to be terminated in the public interest or not under reg. 49 of the 1993 Regulations. There is no requirement under reg. 49 that the appellant's statements be part of the contents of the reports

presented to the Yang di-Pertuan Agong. Also, there is no requirement in law that the appellant be given a copy of the said reports before they were presented to the Yang di-Pertuan Agong.

[33] The appellant finally raised the issue whether the 1st respondent is the proper disciplinary authority within the definition of "Disciplinary Authority" in reg. 3 of the 1993 Regulations. We note that this issue is not really relevant for consideration in the present appeal. It is not in dispute that the termination of the appellant's service in the public interest was made under reg. 49 of the 1993 Regulations; and for that matter he was required to retire by the Yang di-Pertuan Agong under s. 10(5)(d) of the Pensions Act 1980. Substantively, the appropriate Disciplinary Authority has no active role to play in the proceeding under reg. 49. The basic procedures under regs. 49(1) and (3) do not involve the role of an appropriate Disciplinary Authority. The preparation of full report containing particulars relating to the work and conduct of the officer and comments are made by the head of department; presented to the Yang di-Pertuan Agong by the 1st respondent as the Director General of Public Services for His Majesty's consideration and assent. The role of the appropriate Disciplinary Authority is very minimal and not mandatory, as stated in reg. 49(4), to the effect that "it shall be lawful for the appropriate Disciplinary Authority to recommend to the Government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings have not been carried out under any of the provisions of the regulations; and the government may so terminate the service of such officer".

[34] In the present case, as a matter of fact the termination proceeding against the appellant was not initiated by the appropriate Disciplinary Authority under reg. 49(4). In fact, the proceeding was initiated by the government (through the 1st respondent) based on the full report of the appellant's head of department under regs. 49(1), (2) and (3) of the 1993 Regulations. Therefore, the question posed by the appellant as to whether the 1st respondent was the proper Disciplinary Authority within the definition of "Disciplinary Authority" in reg. 3 of the 1993 Regulations, is totally irrelevant for the determination of the present case.

On Judicial Review

[35] The present application came to the court by way of judicial review. The appeal before us is against the decision of the High Court in dismissing the appellant's application for judicial review. Generally, judicial review is not an appeal from a decision, but a review of the manner in which the decision was made and therefore the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable. In short, judicial review is concerned not with the decision, but with the decision making process (see: *T Ganeswaran v. Suruhanjaya Polis Di Raja Malaysia & Satu Lagi* [2005] 3 CLJ 302 – Court of Appeal; *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141).

[36] We are also made aware of the decision of the Federal Court in the case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, where it was held that a decision susceptible to judicial review is not only open to challenge on the ground of procedural impropriety but also on the grounds of illegality and irrationality; and in practice this permits the courts to scrutinise such decisions not only for process, but also for substance.

[37] However, in exercising such power for judicial review the court must be mindful that the court should be slow and cautious in going into the 'substance' of the decision under review, especially in cases involving administrative decision by bodies or persons who are charged with performance of public acts or duties (as in the present appeal). The following statements by Edgar Joseph Jr FCJ, in *R Rama Chandran*'s case itself can be good guidance:

> It must be remembered that we are here concerned with an appeal which arises from Judicial Review proceedings whose target was an Award of the Industrial Court, an inferior court, and not an administrative decision by bodies or persons who are charged with the performance of public acts or duties. It cannot be said, therefore, that by intervening in the manner which we propose to do, and we would be trespassing into the domain of the executive, thus violating the doctrine of the separation of powers, and so acting undemocratically.

Conclusion

[38] Based on the above considerations, we are satisfied that the procedural provisions under regs. 49(1) and (2) of the 1993 Regulations have been strictly complied with by the government before the appellant's service was terminated in the public interest under reg. 49(3) of the said regulations and before the Yang di-Pertuan Agong required him to retire in the public interest under s. 10(5)(d) of the Pensions Act 1980. We find no element of procedural impropriety, illegality or irrationality throughout the proceedings until the appellant's service was terminated by the government. We also find that the learned High Court Judge was correct in dismissing the appellant's application for judicial review. We find no reason to interfere either procedurally or substantively. The decision of the learned High Court Judge is hereby affirmed.

[39] We therefore dismiss the appeal with costs of RM5,000 to the respondents. We make an order that the deposit be paid to the 2nd respondent on account of costs.